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Effect of *prima facie* Evidence Provision in the Cold Check Statute

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only experts deal with the question of *quality* of mind. The commissioner does not make himself clear as to what he means by *quality*. By this rule it would seem that the commissioner in effect said that hereafter, a lay witness may state facts from which the jury might infer mental incapacity, but only experts may express their opinion as to the *condition* of the mind. Mr. Wigmore severely criticizes such a rule. He is heartily in accord with the statutory rule in Alabama which allows the opinion of laymen, after it has been shown that witness has made adequate personal observation.[12]

Though the present state of the law as to opinion evidence on mental capacity is unsettled in Kentucky, it seems safe to draw the following conclusions: (a) opinion evidence by both laymen and experts is of no value unless the witness can relate the facts, which he knows to be true, and upon which he bases his opinion; (b) opinion of experts as to mental capacity of a party is good evidence in Kentucky; and (c) prior to 1937 the opinion of a lay witness as to mental competency of another had probative value, but it seems that Kentucky now follows the Massachusetts rule allowing the layman to give his opinion only as to specific conduct, i.e. after stating facts on which the opinion was based, the witness may testify that one was competent to make a contract, or knew the extent of one's property and the natural objects of one's bounty.

It is submitted that the best rule is that opinion evidence as to mental capacity by either expert or layman is admissible, provided it is established that the witness is in such a position that he can form a valid opinion. The duty to show that the opinion is based on little or no fact and thus of no probative value should be on the cross-examiner.

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EFFECT OF PRIMA FACIE EVIDENCE PROVISION IN THE COLD CHECK STATUTE

Defendant appealed from a conviction under the Cold Check Law and set out as error the refusal of the trial judge to give a peremptory instruction to find him not guilty. The evidence was confusing but it appeared that at the time defendant gave a check for $30.50 to the Harlan Hospital he did not have sufficient funds in the bank to satisfy it. However, he did have a check in his pocket which he immediately deposited. After this deposit was made, his bookkeeper withdrew an amount to cover the weekly payroll and left just enough to take care of the Hospital's check. Subsequently, two other checks amounting to fifty ($50.00) dollars from the Federal Reserve Bank were charged to defendant's account before the Hospital's bookkeeper presented the check in question, and consequently it was dishonored. Later in the day when defendant learned of this he again deposited enough to satisfy the check and

[12] Comment (1932) 26 Ill. L. R. 431, Wigmore, *Evidence*, (3d. ed., 1940), sec. 675.

in addition had his bookkeeper tender the amount to the Hospital, and offer to take up the check in issue, but it was then in the hands of Dr. Howard who could not be found, and who later instituted the prosecution. The judgment was reversed. *Wright v. Com.* 280 Ky. 368, 133 S.W. (2d) 525 (1939).

The Kentucky Statute[1] requires that a person utter a check with an intent to defraud, knowing at the time that the drawer has not sufficient funds in the bank to cover the check, but provides that the making shall be *strong* prima facie evidence of an intent to defraud.

The Court in the instant case held that the presumption of guilt raised by the Commonwealth was completely destroyed by evidence for the defendant and that the Judge should have directed a verdict in his favor. This raises the question of just what does the prima facie evidence provision in the Statute mean?

It is obvious that the Legislature realized the great difficulty the prosecution has, in such cases, in establishing an intent to defraud. And it appears that this provision was included to aid the state in securing convictions. The Legislature attempted to make prima facie evidence enough to compel conviction unless explained, but such a result cannot be obtained in a criminal case because of an accused's constitutional rights. Unrebutted prima facie evidence cannot be regarded as conclusive evidence of a fact (as in civil cases), for it is well established that a defendant can neither be made to prove himself innocent, nor be compelled to testify. Likewise, he can neither suffer a directed verdict, since he is entitled to a trial by jury,[2] nor can any comment be made upon the evidence in regard to burden of proof by the trial judge.[3] Therefore, it is usually held that when a statute makes a set of facts prima facie evident of another fact (the offense) and the Commonwealth establishes these facts they "have made out a case,"[4] or as Mr. Wigmore puts it they have "fulfilled the duty of producing some evidence in order to pass the judge and may properly claim that the jury be allowed to consider the case."[5] It is just evidence enough to invoke the judgment of the jury and support a verdict if one be found.

However, some courts seem to have gone further than merely to allow the prosecution to go to the jury, and have placed the duty of going forward upon the defendant,[6] i.e., offer sufficient[7] evidence

[1] Ky. Stat. (Carroll, 1930), sec. 1213a.

[2] Lefler v. Com., 216 Ky. 176, 287 S.W. 569 (1926); People v. Cannon, 34 N.E. 762, 139 N.Y. 32, 43, 44 (1893).

[3] Davis v. Paducah R. R. Light Co., 113 Ky. 267, 60 S.W. 140 (1902); Mills v. L. & N. R. R. Co., 116 Ky. 309, 76 S.W. 29 (1903); Macon v. Paducah St. Ry. Co., 62 S.W. 496 (1901).

[4] Hughes v. Com., 242 Ky. 412, 46 S.W. (2d) 783 (1931).

[5] IX Wigmore, *Evidence*, (3rd ed., 1940), sec. 2494.

[6] Griffin v. State, 142 Ga. 636, 83 S.E. 540 (1914), held that the Legislature may provide that when specified facts have been proven they shall, even in a criminal case, be prima facie evidence of guilt of accused and shift the burden of proof. Three limitations on this rule are (1) facts must have a fair relation to the main facts,

to explain or destroy these prima facie facts. Upon defendant's failure to explain, it seems that the only logical conclusion is that the judge may convey the idea in his instructions to the jury that the defendant did not carry out the duty cast upon him. Though such instruction does in no way bind the jury to accept, it does as a practical result "impart to the evidence a certain weight, attaches to the testimony an importance which it would not ordinarily have."[8]

Since it has been held unconstitutional to draw a statute not including intent,[9] and since the word "strong" was inserted in the present statute it is submitted that this latter view is the interpreation of prima facie evidence that could better serve the purpose of its creation. The Kentucky court, by way of dictum, has given this provision such an effect.[10] It will be interesting to see if they will so decide. In the principal case, since the duty was discharged,

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(2) they must not be final but must give accused a chance to explain, (3) they must not be purely arbitrary; Yee Hem v. U. S., 268 U. S. 178, 69 L. Ed. 904 (1925); Ry. Co. v. Turnispeed, 31 Sup. Ct. 136, 219 U. S. 35 (1910); O'Toole, *Artificial Presumptions in Criminal Law*, (1937) St. John L. R. 167 at 171 says that "changing burden of proof, modifying presumption of innocence ought not to be condemned as unreasonable if it is rational," giving certain tests of rationality such as *a priori* test, ingrediency test, and *a postereri* test. See Keeton, *Statutory Presumptions, Their Constitutionality and Legal Effect*, (1931) 10 Tex. L. R. 34 at 46; Martin, *Burden of Proof as Affected by Statutory Presumptions of Guilt*, (1939) 17 Can. B. R. 37 (showing the growing tendency of English and Canadian courts to hold that the onus to explain can be cast upon the defendant the failure of which necessarily results in a conviction); I Wharton, *Criminal Evidence*, (11 ed., 1937), sec. 207.

[7] In Ezzard v. U. S., 7 Fed. (2d) 808, Mr. Stone in his dissent in deciding whether the judge or the jury is to determine if sufficient evidence has been given to rebut the "presumptive evidence" says "If that evidence (introduced by defendant) is so conclusive both as to credibility and as to weight, that there can be no reasonable doubt that the possession was innocent (or, here, if intent to defraud was lacking) then the court may so declare. But if it fails to reach this conclusive standard either as to credibility or as to weight, the case should go to jury.

[8] Note (1932) 30 Mich. L. Rev. 600, 606.

[9] 1926 Amendment, Chap. 62 of Ky. Acts of 1926 which dispensed with intent to defraud (and which included post-dated checks) was declared unconstitutional as a debt collecting statute, in Ward v. Com., 228 Ky. 468, 15 S. W. (2d) 276 (1929); 1928 Amendment, Chap. 41 differing from 1926 Amendment only in minor details was declared unconstitutional in Burnam v. Com., 228 Ky. 410, 15 S. W (2d) 256 (1929).

[10] Burnam v. Com., 228 Ky. 410 at 414, 15 S. W. (2d) 256 (1929), "Our former valid statute (speaking of 1914 Stat. which was re-enacted in 1930 and is now substantially our present statute) on this subject provided that the giving of a dishonored check was prima facie evidence of fraud and transferred the burden to the defendant to disprove that criminal intent; *Cf.* Combast v. Com., 137 Ky. 495, 125 S. W. 1092 (1910).

and the judge should have so recognized,[11] the decision is unmistakably sound.

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THE EXTERNAL CIRCUMSTANCES IN CRIMINAL NEGLIGENCE CASES

Criminal liability does not arise from every negligent act, for the actor is criminally responsible only when his negligence is of a higher degree than that which is the basis of civil liability[1] His conduct must indicate, under all the circumstances, a reckless disregard for the lives and safety of others,[2] and if his conduct does evince such recklessness, he is guilty of criminal negligence. If his conduct indicates a wanton disregard for the lives and safety of others, he is guilty of such criminal negligence as constitutes the basis of a conviction for murder.[3]

Whether the conduct of the actor indicates a reckless or wanton disregard for the safety of others can be determined only by a consideration fo the circumstances of each case. The circumstances in any given case may be classified as either subjective or objective, but it is the purpose of this note to discuss only the influence of the objective, or external, circumstances upon the actor's conduct and the care exercised by the actor in view of those circumstances.

One who has in his possession or under his control an instrumentality, dangerous in character, must control it with care proportionate to the danger likely to result from its negligent use.[4] The greater the prospective danger to others, the greater is the degree of care required.[5] It follows that the degree of care required is variable and dependent upon the circumstances, e. g. the nature of the instrumentality, the time, place, proximity of other persons, and other external factors.[6] By reference to a few instrumentalities, the effect of these objective circumstances in criminal negligence cases may be seen.

It is not necessary here to discuss the character of firearms, for it is generally recognized that firearms are dangerous instrumen-

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[11] These facts satisfy the test in note 7 *supra* that the court should have ruled so as a matter of law.

[1] Wells v. State, 162 Miss. 617, 139 So. 859 (1932); Hiller v. State, 164 Tenn. 388, 50 S. W. (2d) 225 (1932); Note (1937) 25 Ky. L. J. 183, 184.

[2] State v. Moore, 129 Iowa 514, 106 N. W. 16 (1916); People v. Przybyl, 365 Ill. 515, 6 N. E. (2d) 848 (1937); State v. Whatley, 210 Wis. 157, 245 N. W. 93 (1932).

[3] Reed v. State, 25 Ala. App. 18, 142 So. 441 (1932) (conviction for murder based on "highly reckless" and "greatly dangerous" conduct); State v. Shepard, 171 Minn. 414, 214 N. W. 280 (1927).

[4] Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796 (1914); 20 R. C. L. 51.

[5] Morrison v. Appalachian Power Co., 75 W. Va. 608, 84 S. E. 506 (1915).

[6] Koontz v. Whitney, 109 W. Va. 114, 153 S. E. 797 (1930); 20 R. C. L. 52, cited with approval in Annotation, 53 A. L. R. 1205.